

IN THE SUPREME COURT OF OHIO

DISCRETIONARY APPEAL FROM THE
CLERMONT COUNTY COURT OF APPEALS,
TWELFTH APPELLATE DISTRICT,
CASE No. CA2021-10-057

STATE OF OHIO

Plaintiff-Appellee,

v.

AUNRICO WILLIAM BAKER BEATTY

Defendant-Appellant.

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INTRODUCTION

This case presents issues of statutory applicability and interpretation regarding firearm specification prison terms and their consecutive service. The questions before this Court are twofold: (1) Which statutory provision – R.C. 2929.14(B)(1)(g) or R.C. 2929.14(C)(1)(a) – governs the consecutive service of multiple firearm specification prison terms? and (2) Does the governing statute authorize the consecutive service of all firearm specification prison terms, or only those that qualify as “mandatory prison terms?” Because the issues presented are ones of statutory applicability and interpretation, this Court reviews them *de novo*. See *State v. Jones*, 163 Ohio St.3d 242, 2020-Ohio-6729, 169 N.E.3d 649, ¶ 17.

There is a natural progression to the applicable statutory provisions at issue in this case. That progression begins with R.C. 2941.145(A) which sets forth the firearm specification itself. That provision sets forth:

(A) Imposition of a three-year mandatory prison term upon an offender under division (B)(1)(a)(ii) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender’s person or under the offender’s control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense. R.C. 2941.145(A).

The indictment in this case contained such a specification for each of the four felonious assault counts. From this provision, we move to R.C. 2929.14(B)(1)(a)(ii) which states in pertinent part:

[I]f an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in section *** 2941.145 of the Revised Code, the court shall impose on the offender one of the following prison terms: (ii) A prison term of three years if the specification is of the type described in division (A) of section 2941.145 of the Revised Code ***. R.C. 2929.14(B)(1)(a)(ii).

In this case, Mr. Beatty was convicted by a jury of four felonious assault counts and also convicted of the four attached specifications described in R.C. 2941.145. However, because the four felonies

and accompanying firearm specifications occurred as part of the same act or transaction, R.C. 2929.14(B)(1)(b) limits the imposition of prison terms. That provision states in part:

Except as provided in division (B)(1)(g) of this section, a court shall not impose more than one prison term on an offender under division (B)(1)(a) of this section for felonies committed as part of the same act or transaction. R.C. 2929.14(B)(1)(b).

Therefore, the trial court in this case was limited to the imposition of one firearm specification prison term unless the exception contained R.C. 2929.14(B)(1)(g) applied. Under the circumstances of this case, R.C. 2929.14(B)(1)(g) does indeed apply. The section states:

If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies are *** felonious assault, ***, and if the offender is convicted of or pleads guilty to a specification of the type described under division (B)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(a) of the section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications. R.C. 2929.14(B)(1)(g).

Pursuant to this provision the trial court was mandated to impose a firearm specification prison term on Mr. Beatty for two of the felonious assault charges, and had discretion whether to impose any additional firearm specification prison terms. In this case, the trial court chose to exercise its discretion and imposed a firearm specification prison term for the two remaining specifications.

Now we are at the final point of statutory progression, and here is where the dispute in this case lies. In order to determine the consecutive service of the multiple firearm specification prison terms imposed by the court, Appellant contends R.C. 2929.14(C)(1)(a) must be examined, while Appellee adheres to the position that R.C. 2929.14(B)(1)(g) dictates the consecutive service. R.C. 2929.14(C)(1)(a) states:

[I]f a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony, *** the offender shall serve

any mandatory prison term imposed under [(B)(1)(a)] *** consecutively to any other mandatory prison term imposed under [(B)(1)(a)], consecutively to and prior to any prison term imposed for the underlying felony pursuant to division (A), (B)(2), or (B)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

So, (1) Does R.C. 2929.14(B)(1)(g) govern the consecutive service of all firearm specification prison terms, or does R.C. 2929.14(C)(1)(a) have a say? and (2) If R.C. 2929.14(C)(1)(a) does apply, is consecutive service of firearm specification prison terms limited to only those prison terms the statute mandates be imposed?

STATEMENT OF FACTS

Our journey actually begins in May 2011 when Marcus Isreal stole a Cadillac in Middletown, Ohio, armed himself with a .357 magnum revolver and started driving to Dayton, Ohio. While passing through Franklin, Ohio, an officer of the Franklin Police Department noticed the Cadillac did not have working taillights. The officer activated his overhead lights and Isreal accelerated in order to avoid the officer's pursuit. Isreal led officers on a high speed chase for some time. Due to his high rate of speed, Isreal eventually lost control of his car crashing into a deputy sheriff's cruiser. The deputy was killed. Isreal fled on foot but was apprehended a few hours later.

Isreal was charged with felony murder, involuntary manslaughter, aggravated vehicular manslaughter, two counts of felonious assault against a peace officer, receiving stolen property, failure to comply with an order or signal of a police officer, and two counts of having weapons while under disability. All the charges carried corresponding firearm specifications. The jury ultimately found Isreal guilty of all counts and specifications except for one of the two felonious assault charges. The trial court ordered Isreal to serve mandatory, one-year sentences for firearm

specifications related to the felony murder, receiving stolen property, and failure to comply charges. The trial court ordered the three one-year firearm specification prison terms to run consecutively to each other.

On appeal, Isreal argued that the firearm specification prison terms should run concurrently because (1) they all arose out of the same act or transaction and (2) the statute does not address whether the trial court is required to order the sentences consecutive or concurrent. The Twelfth District disagreed with this latter point and found that “pursuant to R.C. 2929.14(B)(1)(g), sentences for multiple gun specifications should be run consecutive to each other.” *State v. Isreal*, 12th Dist. Warren No. CA2011-11-115, 2012-Ohio-4876, ¶ 72, citing *State v. Glenn*, 8th Dist. Cuyahoga No. 97314, 2012-Ohio-3075, and *State v. Fischer*, 9th Dist. Summit No. 26110, 2012-Ohio-3665.¹

In the case *sub judice*, the Twelfth District was given an opportunity to reexamine its reasoning in *Isreal*. On the evening of December 1, 2020, Appellant and a group of friends left his home in New Richmond, Ohio, and headed toward the Eastgate area of Clermont County where brothers Trevor and Victor Thompson lived. At this time the Thompson brothers were talking with Rashid and Omar Daoud in their driveway. Rashid had recently arrived to pick up his brother and remained seated in his Toyota 4Runner while the other three remained outside the car. One of Appellant’s friends testified at trial that after arriving at the Thompson home, Appellant got out of the backseat of the car in which he was riding and ran toward the group of people gathered in the driveway and started shooting at them, firing approximately 10 shots. (Tr. at 82-83 (Jury Trial, Day 3)). No one was injured. Most relevant to this appeal, Mr. Beatty was charged with four counts of

¹ In *Beatty I*, the Twelfth District questioned its previous reliance on *Glenn* and *Fischer*. The court noted: “***, neither *Glenn* nor *Fischer* considered whether a firearm prison term imposed at the sentencing court’s discretion pursuant to R.C. 2929.14(B)(1)(g) must be served consecutively to any other prison term.” *Id.* at ¶ 15.

felonious assault with accompanying firearm specifications. Mr. Beatty was found guilty and sentenced on those four counts of felonious assault and each accompanying three-year firearm specification. The trial court sentenced Mr. Beatty to three years in prison on each firearm specification running the four terms of imprisonment consecutively for an aggregate prison sentence of 12 years just on the specifications alone.

On appeal, Mr. Beatty conceded that statutory authority existed for the court to run the first two of the four firearm specification prison terms consecutively, but argued that no such authority existed which would permit the court to run the third and fourth firearm specification prison terms consecutively. The State countered essentially positing the logic of *Isreal* that R.C. 2929.14(B)(1)(g) “controls in authorizing imposition of a consecutive sentence for the additional firearm prison terms.” *State v. Beatty*, 12th Dist. Clermont No. CA2021-10-057, 2022-Ohio-2329 (“*Beatty I*”), at ¶ 12. Therefore, the State asserted, the service of all four firearm specification prison terms could be ordered consecutive.

After analyzing the language of R.C. 2929.14(B)(1)(g) the Twelfth District concluded that “R.C. 2929.14(B)(1)(g) neither states nor implies anything about whether firearm prison terms must be served consecutively, concurrently, or otherwise.” *Beatty I*, at ¶ 13. In so finding, the court recognized that its position conflicted with the court’s 2012 opinion in *State v. Isreal* and held “[t]o the extent that *Isreal* holds that R.C. 2929.14(B)(1)(g) dictates that firearm specification prison terms that are imposed in the sentencing court’s discretion are to be served consecutively, it is overruled.” *Id.* at ¶ 16. The *Beatty I* court went on to hold that “R.C. 2929.14(C)(1) unambiguously addresses the subject by providing that mandatory firearm prison terms be served consecutively to any other mandatory prison term and consecutively and prior to any prison term imposed for the underlying

offense.” *Id.*²

On July 11, 2022, six days after the court’s decision in *Beatty I*, the Twelfth District set the matter for an en banc review. After consideration by all five judges comprising the Twelfth District Court of Appeals, the court issued its en banc opinion overruling “the decision in *Beatty I* to the extent it conflicts with this court’s holding in *State v. Isreal*, 12th Dist. Warren No. CA2011-11-115, 2012-Ohio-4876, that, ‘pursuant to R.C. 2929.14(B)(1)(g), sentences for multiple [firearm] specifications should be run consecutive to each other.’” *State v. Beatty*, 12th Dist. Clermont No. CA2021-10-057, 2022-Ohio-3099 (“*Beatty II*”), at ¶ 1, citing *Isreal* at ¶ 72.

In reinstating the preeminence of the *Isreal* decision the court proffered two justifications in support. First, the court noted that the Supreme Court of Ohio declined to review the court’s decision in *Isreal* implying that in so declining the court essentially sustained the decision. The dissenting opinion responded directly to this justification of *Isreal* noting: “[T]he supreme court did not decline to review *Isreal* *** the supreme court denied *Isreal*’s motion for delayed appeal. *Beatty II*, at ¶ 25 (Powell, M., P.J. and Byrne, J., dissenting), citing *State v. Isreal*, 137 Ohio St.3d 1420, 2013-Ohio-5285. Mr. *Isreal* filed his *pro se* Motion for Delayed Appeal on October 15, 2013, nearly a year after the Twelfth District had decided his direct appeal. *State v. Isreal*, Case No. 2013-1631. The motion was denied and the cause dismissed on December 4, 2013. Second, the court justified the *Isreal* decision by declaring that “[n]umerous other Ohio Appellate districts have approvingly cited to this court’s decision in *Isreal* since its release nearly a decade ago.” *Beatty II*, at ¶ 2. Again, the dissenting opinion outlines why this justification creates an “inaccurate impression.”

² When a statute is unambiguous, courts must “apply it, not interpret it.” *State v. Bortree*, Slip Opinion No. 2022-Ohio-3890, ¶ 16, citing *Specialty Restaurants Corp. v. Cuyahoga Cty. Bd. of Revision*, 96 Ohio St.3d 170, 2002-Ohio-4032, 772 N.E.2d 1165, ¶ 11.

See, Beatty II, at ¶¶ 18-25.

Appellant filed his Notice of Appeal with accompanying Memorandum in Support of Jurisdiction with this Court on October 18, 2022. On January 17, 2023, this Court accepted the appeal.

ARGUMENT

PROPOSITIONS OF LAW³

Proposition of Law No. I: R.C. 2929.14(C)(1)(a), not R.C. 2929.14(B)(1)(g), governs the consecutive service of multiple prison terms imposed on firearm specifications

As is evident from the above Statement of Facts, a disagreement has arisen in the Twelfth District regarding which of two statutory provisions governs the consecutive service of firearm specification prison terms. The *Isreal/Beatty II* majorities believe R.C. 2929.14(B)(1)(g) governs, while the *Beatty I* majority insists that R.C. 2929.14(C)(1)(a) answers that question. After a careful examination of both statutory provisions, R.C. 2929.14(C)(1)(a) emerges as the clear winner.

A. The Language of the Statutes

Even the most cursory examination of the statutory language of the two provisions gives the edge to R.C. 2929.14(C)(1)(a). Not only does that subsection deal with firearm specifications, it directly addresses the consecutive service of those specifications – the word ‘consecutively’ appearing three separate times. By contrast, the language of R.C. 2929.14(B)(1)(g) fails to address the consecutive service of firearm specifications and the words ‘service’ or ‘consecutive,’ or any

³ In Appellant’s Memorandum in Support of Jurisdiction filed October 18, 2022, Appellant proffered one proposition of law. That proposition of law, however, was inartfully crafted and was, in fact, the amalgamation of two distinct propositions of law. For ease of discussion herein, Appellant has separated the two propositions out and shall address them independently if permitted.

derivations thereof, do not appear at all. Here are the two statutory provisions side-by-side:

R.C. 2929.14(B)(1)(g)

If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies are aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, and

if the offender is convicted of or pleads guilty to a specification of the type described under division (B)(1)(a) of this section in connection with two or more of the felonies,

the sentencing court *shall*⁴ *impose* on the offender the prison term specified under division (B)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and,

in its discretion, also *may*⁵ *impose* on the offender the prison term specified under that division for any or all of the remaining specifications. (Emphasis added.)

R.C. 2929.14(C)(1)(a)

[I]f a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(a) of this section for having a firearm on or about the offender's person or under the offender's control while committing a felony, ***

the offender *shall serve* any mandatory prison term imposed under [(B)(1)(a)] ***

consecutively to any other mandatory prison term imposed under [(B)(1)(a)],

consecutively to and prior to any prison term imposed for the underlying felony pursuant to division (A), (B)(2), or (B)(3) of this section or any other section of the Revised Code, and

consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender. (Emphasis added.)

“[T]he General Assembly has the plenary power to prescribe crimes and fix penalties.” *State v. Morris*, 55 Ohio St.2d 101, 112, 378 N.E.2d 708 (1978). Thus, “the only sentence which a trial judge may impose is that provided for by statute * * *.” *State v. Anderson*, 143 Ohio St.3d 173,

⁴ [T]he “use of the term ‘shall’ in a statute connotes a mandatory obligation unless other language evidences a clear and unequivocal intent to the contrary.” *Wilson v. Lawrence*, 150 Ohio St.3d 368, 2017-Ohio-1410, ¶ 13, citing *State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, ¶ 28.

⁵ “May” is permissive, not mandatory. *See Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 271 N.E.2d 834 (1971), paragraph one of the syllabus (“In statutory construction, the word ‘may’ shall be construed as permissive and the word ‘shall’ shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage.”)

2015-Ohio-2089, 35 N.E.3d 512, ¶ 12, quoting *State v. Beasley*, 14 Ohio St.3d 74, 75, 471 N.E.2d 774 (1984). “Judges have no inherent power to create sentences.” *State v. Reed*, 162 Ohio St.3d 554, 2020-Ohio-4255, 166 N.E.3d 1106, ¶ 17, quoting *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶22, citing Griffin & Katz, *Ohio Felony Sentencing Law*, Section 1:3, at 4 (2008), fn. 1. “Rather, judges are duty bound to apply sentencing laws as they are written.” *Id.*, quoting *Fisher*.

It is clear from an examination of the words of R.C. 2929.14(B)(1)(g) that the General Assembly empowered trial courts to “impose” a separate prison term on multiple firearm specifications. The General Assembly created a bifurcated structure for the imposition of those prison terms – the imposition of some firearm specification prison terms (the two most serious) would be mandatory, while any remaining would be discretionary. The language of R.C. 2929.14(B)(1)(g) is silent, however, as to how those once-imposed firearm specification prison terms, whether mandatory or discretionary, are to be served.

The language of R.C. 2929.14(C)(1)(a), on the other hand, deals directly with the service of firearm specification prison terms. That provision sets out: “the offender shall serve any mandatory [firearm specification] prison term *** consecutively to ***, consecutively to ***, and consecutively to ***.” It is evident that this statutory provision concerns the consecutive service of firearm specification prison terms.

Therefore, when simply analyzing the language of the two statutes, it is facially apparent that R.C. 2929.14(B)(1)(g) empowers a trial court to “impose” firearm specification prison terms, and R.C. 2929.14(C)(1)(a) then empowers the court to run some of those imposed prison terms consecutively.

B. The Isreal and Beatty II Decisions are Flawed

The Twelfth District’s decisions in *Isreal* and *Beatty II* are wrongly decided and their underlying rationale is flawed. The flaws in the *Isreal* and *Beatty II* decisions are two-fold: (1) the court added criteria to R.C. 2929.14(B)(1)(g) by conflating the authority to ‘impose’ multiple prison terms with the ‘service’ of those prison terms; and, (2) the court ignored R.C. 2929.14(C)(1)(a).

1. Adding Criteria

The first flaw in the *Isreal/Beatty II* reasoning is that those decisions add criteria to R.C. 2929.14(B)(1)(g) which is not supported by the statutory text. “[T]he proper role of a court is to construe a statute as written without adding criteria not supported by the text.” *State v. Taylor*, 163 Ohio St.3d 508, 2020-Ohio-6786, ¶ 27. “[A]ppellate review should resist the temptation to rewrite a statute to be more comprehensive or provide a more thorough meaning[.]” *Amba Invests. v. Clark*, 12th Dist. Butler No. CA2021-02-016, 2022-Ohio-43, ¶ 24, citing *State ex rel. Cable News Network, Inc. v. Bellbrook-Sugarcreek Local Schools*, 163 Ohio St.3d 314, 2020-Ohio-5149, ¶ 11. The *Isreal/Beatty II* decisions violated these tenets of statutory interpretation.

In *Isreal*, the Twelfth District acknowledged that R.C. 2929.14(B)(1)(g) does not expressly address consecutive service. The court noted: “[T]he General Assembly did not include the word “consecutive” in R.C. 2929.14(B)(1)(g) ***.” *Isreal*, at ¶ 73. Despite the admitted absence of the word “consecutive,” the *Isreal* court concluded that pursuant to that subsection “sentences for multiple gun specifications should be run consecutive to each other.” *Isreal*, at ¶ 72.

How exactly did the *Isreal* court justify its ruling without the words “consecutive” or “service/serve” appearing in the statute? The *Isreal* court relied upon the fact that the General Assembly “carved out an exception to the general rule that a trial court may not impose multiple firearm specifications for crimes committed within a single transaction.” *Id.* at ¶ 73. The *Isreal* court

reasoned that “[t]he mandatory language of the statute (“the court shall **impose**”) *also indicates* the General Assembly’s intention that the defendant **serve** multiple sentences for firearm specifications associated with the enumerated crimes, such as murder or felonious assault.” *Id.* (Emphasis added.) The *Isreal* court found its way to consecutive service by enlarging the statutory authority “shall impose” multiple firearm specification prison terms to instead read “shall impose and run consecutively” those prison terms. The authority to impose prison sentences and the authority to then order consecutive service of those prison sentences are two separate and distinct powers granted trial courts. *See, Beatty II*, at ¶ 11. “[T]he power to impose a prison term does not suggest it be served consecutively.” *Id.* *Isreal*’s expansive interpretation of the statutory authority “shall impose” is contrary to law.

2. *Ignoring R.C. 2929.14(C)(1)(a)*

Perhaps more troubling is *Isreal* and *Beatty II*’s complete disregard for R.C. 2929.14(C)(1)(a), “the statute which prescribes how firearm specification prison terms are to be served.” *Beatty II*, at ¶ 13. Remember, the issue in this appeal involves the consecutive service of firearm specification prison terms. R.C. 2929.14(C)(1)(a) contains the terms (1) “mandatory prison terms,” (2) “(B)(1)(a)” – the firearm specification subsection, (3) the phrase “having a firearm on or about the offender’s person or under the offender’s control while committing a felony,” (4) the words “shall serve,” and (4) the word “consecutively,” appears three times. How can that subsection be ignored? At the very least the court’s decision in *Beatty II* should have acknowledged the existence of that provision and explained why it did not apply. Instead, the court simply turned back to R.C. 2929.14(B)(1)(g), claiming that both the Supreme Court of Ohio and numerous appellate districts have ratified and adopted the *Isreal* holding.

The fatal flaw in both the *Isreal* and *Beatty II* decisions is that they are incomplete.

No decision claiming to espouse settled law surrounding the consecutive service of firearm specification prison terms can be authoritative without considering the language of R.C. 2929.14(C)(1)(a). As the dissent in *Beatty II* summed up: “*Isreal* finds justification by *** ignoring R.C. 2929.14(C)(1)(a), the statute specifying how firearm prison terms are to be served, ***.” *Beatty II*, at ¶ 27.

C. *Beatty I*

When the Twelfth District Court of Appeals in *Beatty I* addressed the issue of which statutory provision governed consecutive service of firearm specification prison terms, the court came down solidly on the side of R.C. 2929.14(C)(1)(a). In rejecting the State’s claim (and effectively the *Isreal* holding) that R.C. 2929.14(B)(1)(g) applied the court held: “[T]here is nothing in the text of R.C. 2929.14(B)(1)(g) addressing whether firearm prison terms should be served consecutively to any other prison term.” *Beatty I*, at ¶ 13. The court elaborated:

R.C. 2929.14(B)(1)(g) does three things. First, it creates an exception to the general rule of R.C. 2929.14(B)(1)(b) that not more than one firearm prison term may be imposed upon an offender for felonies committed as part of the same act or transaction. Second, it requires imposition of prison terms for the two most serious firearm specifications. Third, it permits imposition of firearm prison terms in addition to those for the two most serious. *Id.*

“On the other hand,” the *Beatty I* court continued, “R.C. 2929.14(C)(1) unambiguously addresses the subject by providing that mandatory firearm prison terms be served consecutively to any other mandatory prison term and consecutively and prior to any prions term imposed for the underlying offense.” *Id.* at ¶ 16. The court concluded:

The explicit direction in R.C. 2929.14(C)(1) regarding the service of firearm prison terms, coupled with the absence of any language in R.C. 2929.14(B)(1)(g) regarding service of such prison terms, clearly demonstrates that R.C. 2929.14(B)(1)(g) does not imply how firearm prison terms are to be served. *Id.*

Appellant contends that the *Beatty I* decision got it right. In part, because it represents a

complete analysis. The court considered the two competing statutory provisions and conducted a thorough review of the statutory language of each. After completing that analysis, the *Beatty I* court correctly concluded that R.C. 2929.14(C)(1)(a) governs the consecutive service of firearm specification prison terms.⁶

D. Concurrent Sentences

Another point addressed by the dissent in *Beatty II* worth mentioning here is the general rule that sentences are to be served concurrently, subject only to clearly delineated exceptions. *State v. Polus*, 145 Ohio St.3d 266, 2016-Ohio-655, ¶ 10, citing R.C. 2929.41(A). [C]oncurrent sentences are the default. *State v. Hitchcock*, 157 Ohio St.3d 215, 2019-Ohio-3246, 134 N.E.3d 164, ¶ 21.

R.C. 2929.41(A) states in pertinent part: “Except as provided in *** division (C) of section 2929.14, a prison term *** shall be served concurrently with any other prison term *** imposed by a court of this state ***.”⁷ In order to locate the exceptions to the general rule of concurrent sentences, R.C. 2929.41(A) directs the intrepid researcher to R.C. 2929.14(C), and what do we find there? We find paragraph after paragraph of instances when consecutive sentences are authorized. Most notably, R.C. 2929.14(C)(1)(a) is there. Interestingly, R.C. 2929.41(A) does not direct the legal scholar to R.C. 2929.14(B)(1)(g) for an exception to concurrent sentences. *See, Beatty II*, at ¶ 14-15.

The very structure of the Ohio Revised Code supports the conclusion the R.C. 2929.14(C)(1)(a) governs the consecutive service of firearm specification prison terms. The assembly of the ORC in this way makes plain that finding a justification for consecutive service of firearm specification prison terms in R.C. 2929.14(B)(1)(g) is, quite literally, misplaced.

⁶ Most recently the Fifth District Court of Appeals found that R.C. 2929.14(C)(1)(a) governs the consecutive service of firearm specification prison terms. *See, State v. Penn*, 5th Dist. Ashland No. 22 COA 014 and 015, 2023-Ohio-4801.

Based on the foregoing, Appellant respectfully requests this Court find that R.C. 2929.14(C)(1)(a) governs the “service” of multiple firearm specification prison terms, while R.C. 2929.14(B)(1)(g) simply empowers a court to “impose” those prison terms.

Proposition of Law No. II: R.C. 2929.14(C)(1)(a) authorizes the consecutive service of “mandatory prison terms” imposed on firearm specifications, there is no statutory authority for consecutive service of those firearm specification prison terms which were imposed at the discretion of the court

Should this Court conclude that R.C. 2929.14(C)(1)(a) provides the statutory authority for the consecutive service of firearm specification prison terms, the question remains: What is the scope of that authority? As noted above, R.C. 2929.14(B)(1)(g) creates a bifurcated structure when it comes to the imposition of multiple firearm specification prison terms. For the two most serious specifications the trial court is instructed that it “shall impose” a prison term, but for any additional specifications the trial court is told it “may impose” a prison term but is not mandated to do so.

Appellant has argued that this bifurcated structure creates “mandatory firearm specification prison terms,” and “discretionary firearm specification prison terms” and because R.C. 2929.14(C)(1)(a) speaks solely in terms of “mandatory prison terms” it is only those prison terms that can be run consecutively. In other words, R.C. 2929.14(C)(1)(a) does not authorize the consecutive service of discretionary firearm specification prison terms. Because no statutory authorization exists, the default of concurrent sentences remains.

R.C. 2929.14(C)(1)(a) states in pertinent part:

[I]f a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(a) of this section for having a firearm on or about the offender’s person or

⁷ The statute also lists “division (B) of this section” and “division (D) or (E) of section 2971.03 of the Revised Code” as exceptions as well, but those provisions are not applicable in this case.

under the offender's control while committing a felony *** the offender shall serve any mandatory prison term imposed under [(B)(1)(a)] *** consecutively to any other mandatory prison term imposed under [(B)(1)(a)] ***, consecutively to and prior to any prison term imposed for the underlying felony ***, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.⁸

From the statutory language above it is apparent that the General Assembly wished to limit the consecutive service of firearm specification prison terms to those prison terms which qualified as "mandatory prison terms." The use of the phrase "mandatory prison term" is limiting in nature. The statute only applies to a specific type of prison term, it does not apply to all prison terms. Had the General Assembly intended for all prison terms to run consecutively, it would have simply dropped the adjective "mandatory." Therefore, the scope of the authority granted to trial courts to run certain prison terms consecutively hinges on the definition of the phrase "mandatory prison term."

A. Mandatory in Imposition vs. Mandatory in Duration

Fortuitously, the phrase "mandatory prison term" is defined in the Ohio Revised Code. The definition is found in R.C. 2929.01(X). That subsection reads in pertinent part:

(X) "Mandatory Prison Term" means any of the following:

(1) Subject to division (X)(2) of this section, the term in prison ***that must be imposed*** for the offenses or circumstances set forth in divisions (F)(1) to (8) or (F)(12) to (21) of section 2929.13 and division (B) of section 2929.14 of the Revised Code. (Emphasis added.)

R.C. 2929.01(X)(1) specifically references R.C. 2929.14(B). Therefore, for purposes of this appeal, a "mandatory prison term" means the term in prison that must be imposed for the *** circumstances set forth in R.C. 2929.14(B). As set out above, R.C. 2929.14(B)(1)(g) contains the statutory authorization permitting a trial court to impose a mandatory prison term for the two most serious firearm specifications. A "mandatory prison term" is one that must be imposed in R.C.

⁸ The present version of R.C. 2929.14(C)(1)(a) appears identical to that in effect in 2012.

2929.14(B). Prison terms for Mr. Beatty’s third and fourth firearm specifications are not ones that “must be imposed.” Because the trial court had discretion whether or not to impose a prison term on those two specifications, they are, by definition, not “mandatory prison terms.” Not being “mandatory prison terms,” R.C. 2929.14(C)(1)(a) provides no authority for their consecutive service.

The Twelfth District in *Beatty I* essentially reached the same conclusion. The court closely examined the meaning of “mandatory prison term.” The State had argued that every 3-year prison term imposed for a firearm specification was a “mandatory prison term” because the 3-year duration of the prison term was not subject to reduction by the court. *See, id.* at ¶ 17. The State reasoned that what makes a “mandatory prison term” mandatory is the immutability of the duration of the prison term. *Beatty I* found the State’s focus on the duration of the prison term misplaced.

The court reasoned that that word “mandatory” in the phrase “mandatory prison term” did not address the *duration* of the prison term, but the trial court’s lack of discretion in the *imposition* of the prison term. The word “mandatory” concerns the act of imposing the prison term, not with its length. The *Beatty I* court concluded:

[W]hen a sentencing court *must* impose a prison term as a sanction, it is a “mandatory prison term,” without regard to whether the sentencing court has discretion to select the duration of the term. As such, it is the sentencing court’s lack of discretion to impose a prison term, not whether the term is subject to reduction, that qualifies the prison term as a “mandatory prison term.” *Id.* at ¶ 18 (Emphasis in original).

The court found support for this position in case law. “A mandatory prison term is one that must be imposed for an offense, even where the sentencing court can choose among a range of available prison terms.” *Id.* at ¶ 18, citing *State v. Jordan*, 7th Dist. Harrison No. 18 HA 0001, 2019-Ohio-1094, ¶ 11; *see also, State v. Chaffins*, 3d Dist. Putnam No. 12-12-05, 2012-Ohio-4011, ¶ 17.

The court concluded that because a trial court has discretion whether or not to impose a

prison term for a third and fourth firearm specification, those prison terms, by definition, are not “mandatory prison terms.” “The fallacy in characterizing the additional firearm prison terms as ‘mandatory prison terms’ for purposes of R.C. 2929.14(C)(1), is that the trial court had discretion to impose them under R.C. 2929.14(B)(1)(g).” *Id.* The *Beatty I* court concluded:

Because imposition of the additional firearm prison terms in the present case was discretionary, they are not prison terms which the trial court “must” impose, are consequently not included within the statutory definition of “mandatory prison term,” and are therefore not subject to consecutive service pursuant to R.C. 2929.14(C)(1). *Id.* at ¶ 19.

Appellant asks this Court to adopt the reasoning set forth in *Beatty I*, namely that (1) statutory authorization for the consecutive service of firearm specification prison terms is limited to those prison terms which qualify as “mandatory prison terms,” (2) a “mandatory prison term” is one wherein the trial court has no discretion whether to impose a prison term – a prison term must be imposed, (3) because the trial court had discretion whether to impose a prison term on Mr. Beatty’s third and fourth firearm specifications those prison terms do not qualify as “mandatory prison terms,” (4) not being “mandatory prison terms,” R.C. 2929.14(C)(1)(a) does not provide statutory authority for their consecutive service, and (5) because R.C. 2929.14(C)(1)(a) does not provide statutory authority for consecutive service of Mr. Beatty’s third and fourth firearm specifications, concurrent sentences remain the default pursuant to R.C. 2929.41(A).

CONCLUSION

The sentence imposed by the trial court and affirmed by the court of appeals is contrary to law. R.C. 2929.14(B)(1)(g) does not authorize the consecutive service of firearm specification prison terms. Statutory authority to do so is found in R.C. 2929.14(C)(1)(a). To the extent that *Beatty II* relies on R.C. 2929.14(B)(1)(g) for such proposition of law, it must be overruled.

R.C. 2929.14(C)(1)(a) does not authorize the consecutive service of all firearm specification prison terms. That section very specifically limits consecutive service of firearm specification prison terms to those which qualify as “mandatory prison terms” as defined in R.C. 2929.01(X). Because the imposition of some firearm specification prison terms is left to the discretion of the trial court, those prison terms, by definition, are not ‘mandatory prison terms.’ Not being ‘mandatory’ those discretionary prison terms are not statutorily eligible for consecutive service.

THEREFORE, based on the foregoing, Appellant respectfully requests that the consecutive service ordered on Mr. Beatty’s third and fourth firearm specification prison terms be vacated and those terms be ordered to run concurrently to his two other firearm specification prison terms which were properly ordered to run consecutively.

Respectfully submitted,
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CLERMONT COUNTY PUBLIC DEFENDER

/s/ Robert F. Benintendi

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Merit Brief of Appellant was served by regular U.S. mail, postage prepaid, this 21st day of April 2023, upon Nick Horton, Esq., Assistant Prosecuting Attorney, 76 South Riverside Drive, Second Floor, Batavia, Ohio 45103.

/s Robert F. Benintendi _____

Robert F. Benintendi (0059525)
Counsel for Appellant

APPENDIX

En Banc Opinion of the Twelfth District Court of Appeals (filed September 6, 2022)

En Banc Judgment Entry of the Twelfth District Court of Appeals (filed September 6, 2022)

Opinion of the Twelfth District Court of Appeals (filed July 5, 2022)

Judgment Entry of the Twelfth District Court of Appeals (filed July 5, 2022)

Judgment Entry Sentencing Defendant (filed September 24, 2021)

Ohio Revised Code §2929.14

Ohio Revised Code §2929.01